IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15866

IRMGARD SANTOS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petition to Review Decision of the Tax Court of the United States

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner's original brief was premised on the contention that the action of the Commissioner in reversing the credits herein involved was an effort on the part of the Commissioner to circumvent and nullify the decision of this Court. The Government's brief argues that the action of the Commissioner was neither intended to nor was, in fact, a contravention of this Court's earlier decision herein.

We believe it would be of assistance to the Court to point out the error of the Commissioner's position and to mention certain established rules dealing with the problem involved.

STATUTE PROHIBITS ABATEMENT OF JEOPARDY ASSESSMENT AFTER TAX COURT DECISION

It should be remembered that in this case a jeopardy assessment was made and a notice of deficiency issued on October 15, 1952, under the authority conferred by Sec. 273, Internal Revenue Code of 1939.

The taxpayer filed a timely appeal with the Tax Court. Thereafter, on December 30, 1954, the Commissioner collected the assessed transferee liability by means of crediting overpayments of income tax for the years 1945 and 1946 determined by the Tax Court as the result of a stipulation between the parties.

June 18, 1956, the Tax Court entered its decision that the petitioner was liable as transferee. The petitioner appealed to this Court which, on June 28, 1957, reversed the Tax Court. The opinion of this Court is set forth at pages 11-14 of petitioner's original brief.

On August 8, 1957, the District Director reversed the credits referred to above and applied them against the income tax liability of Lawrence Santos for 1945, despite the fact that this Court had held that the petitioner was not liable as a transferee of the assets of Lawrence Santos for 1945.

Thereafter, on August 28, 1957, the Tax Court in an *ex parte* action decided that petitioner was not liable as a transferee of the assets of Lawrence Santos for 1942 to 1946, inclusive. (R. 7)

On December 6, 1957, the Tax Court denied petitioner's motion that the decision of August 28, 1957, be vacated and an order entered determining that an overpayment was due petitioner in the amount of $77,118.47. (R. 14)

The Internal Revenue Code of 1939 specifically provides in Sec. 273 (c) with respect to jeopardy assessments:

> "The Commissioner may, at any time before the *decision of the Tax Court is rendered,* abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount." [Italics supplied]

Sec. 273 (k) also specifically states:

> "The Secretary may abate the jeopardy assessment if he finds that jeopardy does not exist. *Such abatement may not be made after a decision of The Tax Court of the United States in respect of the deficiency has been rendered* * * *." [Italics supplied]

The language quoted above shows that Congress has specifically provided that, in the case of a jeopardy assessment, the Commissioner has no power to abate a tax after the Tax Court has rendered its decision. In other words, the action taken in this case is clearly prohibited by statute as well as by all possible conceptions of equity and fair dealing.

CASE LAW SUPPORTS PETITIONER

Even if the foregoing is disregarded, there is much law to support the petitioner's position in this case.

The United States District Court for the Southern District of California in *Western Wholesale Drug Co.* v. *United States* (1930), 47 F. (2d) 770, 9 A.F.T.R. 1013, said that a credit is "a final disposition of the assessment in question" and that the Commissioner did not have a lawful right to reverse such a credit.

The United States District Court for the Northern District of California on April 7, 1938, decided the case of *Maud Hemrich* v. *United States,* No. 20,300-R, 23 A.F.T.R. 1161. In that case, Judge Roche decided that an overpayment of taxes made by a wife on a separate return was refundable despite unpaid taxes due by the husband.

The Court of Claims has dealt with this question in at least two instances. In *Krug* v. *United States,* (1937) 18 F. Supp. 242, 18 A.F.T.R. 1256, it appears that a husband and wife made separate income tax returns. The Commissioner redistributed the income between the two returns, increasing that of the husband and decreasing that of the wife. The Court of Claims held that the wife was entitled to a refund, even though the deficiency could not be collected from the husband. The Court states (p. 248):

> "The arbitrary refusal to make a refund to one spouse merely because collection cannot be made of a deficiency from the other spouse is unlawful and inequitable."

In *Ina Claire* v. *United States* (1940), 34 F. (2d) 1009, 25 A.F.T.R. 892, the facts are somewhat similar to those here involved. The Court held that reversal of credits between husband and wife due to an inability to collect from one was void.

The Government's brief apparently is making an effort to have this Court reconsider the case on its merits, even though it did not appeal from the decision of the Tax Court. The Government's argument completely avoids the issues which this Court is asked to decide.

Certain fundamental rules govern.

If an appeal is taken to the Tax Court, the jurisdiction of the Tax Court is exclusive. The taxpayer is prohibited from bringing suit in any other court for the recovery of any tax where a notice of deficiency was mailed and a petition filed with the Tax Court. (Sec. 6212 (a), p. 11, original brief)

A decision of the Tax Court "is res judicata as to the questions involved in the computation and assessment of taxes for which a deficiency is claimed." *United States ex rel Girard Trust Co.* v. *Helvering,* 301 U. S. 540.

The Court of Claims has stated the rule to be that the Tax Court has "exclusive power ultimately and finally to decide all questions, both as to deficiencies and overpay-

ments, that could arise between the taxpayer and the Government in connection with the tax liability for the year or years involved in such proceeding * * * ". *Ohio Steel Foundry Co.* v. *United States* (1930), 38 F. (2d) 144, 148, 8 A.F.T.R. 10136, quoted with favor in *American Woolen Co.* v. *United States* (Ct. Cls. 1937), 18 F. Supp. 783, 789, 19 A.F.T.R. 63.

The Commissioner argues in effect that the litigation here involved should not be determinative of the petitioner's rights. He states that we should, in effect, forget this appeal and bring a suit in the District Court or the Court of Claims. *United States ex rel Girard Trust Co.* v. *Helvering,* 301 U. S. 540 and *Empire Ordnance Corp.* v. *Harrington,* 249 F. (2d) 680, are cited in support of this position. The sole question decided in both the *Girard* and *Empire* cases was that mandamus is not the correct procedure to compel the refund of overpayments determined by the Tax Court.

As indicated above, the Tax Court decision is res judicata as to the questions involved in the computation and assessment of taxes. We cannot sue for a refund in this case because the Tax Court has determined that there is no overpayment.

The Tax Court, in 1954, decided that the petitioner overpaid her income tax for the years 1945 and 1946 in the principal amounts of $24,768.51 and $38,237.18, respectively. (R. 13) The decision was entered as a result of a stipulation of the parties. The right of appeal, if any, has long since expired.

The Government apparently argues that we should sue in a District Court or the Court of Claims to compel payment of the income tax refunds determined for 1945 and 1946. Its brief indicates that it would then argue that, under the law, the petitioner herein is liable for taxes which have been assessed against her husband. The difficulty of the Government's position is that this Court, in the present proceeding, has determined that the petitioner

is not liable on account of her husband's taxes. This Court should not permit the Government to again litigate the point.

A further reason why the Government's position is untenable is that the Internal Revenue Code specifically provides for the issuance of a notice of deficiency with a right of appeal to the Tax Court if the Commissioner determines that a taxpayer is liable either for taxes or as a transferee. The Government cannot now issue a notice of deficiency against the petitioner because, having issued the notice which was the basis of this proceeding, it is prohibited from issuing another notice. (Sec. 6212 (c), Internal Revenue Code of 1954, Sec. 272 (f), Internal Revenue Code of 1939.)[1] Therefore, it is trying to enlist this Court's aid in an effort to avoid the statutory restrictions so that it may litigate the contention that the petitioner is liable under some kind of a construction of the Hawaiian Community Property laws.

CONCLUSION

The second decision of the Tax Court in this case should be reversed with instructions to the Tax Court to enter a decision that there is an overpayment of transferee liability in the amount of $77,118.47, and such overpayment was paid by credit on September 30, 1954.

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May 15, 1958

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1 Sec. 272 (f), Internal Revenue Code of 1939 (The provisions of Sec. 6212 (c) Internal Revenue Code of 1954 are substantially the same):

"(f) Further Deficiency Letters Restricted.—If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Tax Court within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, * * *."